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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

CONTENTS

Page

COMMENTS RECEIVED FROM MEMBER STATES

Mexico 2

New Zealand 4

Romania 10

United Kingdom of Great Britain and Northern Ireland 11

MEXICO

[Original: Spanish]

[15 February 1994]

[The Government of Mexico] is not attempting to comment exhaustively on the report of the International Law Commission's Working Group on a draft statute for an international criminal court, for its comments refer only to those points relating to the establishment of an international criminal court which it thinks need further study.

Mexico expresses its thanks to the Working Group for its report. Its in-depth treatment of the relevant issues without a doubt significantly advances the development of the topic, yet it also brings out the variety of complex problems that have to be dealt with before proceeding to establish the Court.

The Working Group must therefore carefully analyse the comments made by the various States both in the Sixth Committee debates during the forty-eighth session of the General Assembly and subsequently.

Specific comments

The Tribunal as proposed by the Working Group in its draft Statute is expected to be a body that will meet only when a case is submitted for its consideration. The practicality of such a mechanism will no doubt attract the general support of the international community.

As to the manner in which the Tribunal is to be set up, it became clear during the latest session of the General Assembly that most States endorsed the idea of a tribunal established by an international agreement. Mexico shares that view, and once the basic problems relating to the establishment of an international criminal court are resolved, the body to be instituted should be defined in an international treaty under which each State assumes the obligations it deems appropriate, and the observance of the principle res inter alios acta is fully guaranteed.

How the Tribunal is to be linked to the United Nations is a question that has been approached in different ways. Although the majority recognize the need for a relationship with the United Nations system, the manner in which this is to be done is still being debated. Since the body in question is a jurisdictional one where impartiality and independence become essential, Mexico believes that the relationship to the United Nations must be limited to an agreement to cooperate. The Tribunal must not be conceived as an organ of the United Nations, as proposed, within brackets for the moment, in the draft Statute.

Articles 19 and 20 of the draft Statute give the Court the power to determine its own internal rules, rules of procedure, rules of evidence and in general all the rules necessary for the proper implementation of the draft Statute. We believe that power is too broad. In the interests of legal certainty, it would be preferable if the rules governing the functioning of the

Court were established in the draft Statute itself as clearly as possible, leaving the Court only the authority to determine administrative provisions.

The observance of the principle nullum crimen sine lege, nulla poena sine lege demands that special attention be given to the crimes over which the Tribunal is to be given jurisdiction. Mexico believes that only exceptionally serious international crimes should fall within its purview. Consequently, the list of crimes in article 22 of the draft Statute must be studied with greater care, because the fact that a crime is covered under an international treaty is not of itself enough to confer jurisdiction on the Court.

Furthermore, the provisions of articles 25 and 26 of the draft Statute, which give the Court jurisdiction over violations of peremptory norms of international law and over exceptionally serious crimes so identified in national legislation and give the Security Council the authority to submit cases to the Court, in practice create serious legal difficulties that demand an in-depth study, in the light specifically of criminal law, of the scope of those articles.

In establishing an international court, another problem clearly arises in connection with the question of applicable substantive law. The Working Group's draft text determines that in settling cases submitted to it the Court shall apply the Statute, the applicable international treaties, the rules and principles of general international law and, as a subsidiary source, any applicable rule of national law. A provision of such scope, which leaves it to the Court's discretion to decide which norm to apply, not only opens the door to legal uncertainty but runs counter to the principle of legality as it pertains to criminal law. Accordingly, progress must first be made in integrating the rules of international criminal law.

On the subject of international cooperation and judicial assistance, the machinery set up for bringing the accused before the Court must always take account of the need at all times to respect the guarantees of due process which local laws generally afford individuals. If this concern is reflected and met in the draft Statute, it will attract greater support from the international community.

Trials in absentia, dissenting opinions, double jeopardy and appeals are still matters of considerable concern among the members of the international community. The establishment of an international criminal tribunal gives rise to quite a few problems. However, Mexico expects that the Working Group in charge of the topic will succeed in finding satisfactory solutions.

Only a tribunal whose goal is to guarantee genuine compliance with the law and in which effectiveness, respect for the law and impartiality combine and complement each other will secure the support of the international community.

NEW ZEALAND

[Original: English]

[23 February 1994]

In response to the invitation issued by the General Assembly (resolution 48/31 of 9 December 1993 refers), the New Zealand Government submits the following comments on the draft statute for the establishment of an international criminal court, prepared by the International Law Commission.

Article 2. Relationship of the Tribunal to the United Nations

New Zealand considers that an international criminal court should be established by a statute in the form of a treaty among States parties. New Zealand does not see the question of the form of the court's relationship to the United Nations as a central issue in the draft statute. The purpose of the court is the administration of criminal justice for the international community and this important role may need to be reflected by giving the court appropriate judicial status within the United Nations system, as in the case of the International Court of Justice. While we would be happy accordingly to see the court established as a judicial organ of the United Nations, further consideration does need to be given to the feasibility and ease of proceeding in this way within the terms of the Charter of the United Nations.

Article 7. Election of judges

New Zealand is aware that the statute of the Yugoslav tribunal provides a precedent for the procedure for nomination of candidates contained in article 7 (2). The court, on the other hand, will be a permanent rather than an ad hoc body. A nomination process comparable to that in Article 4 of the Statute of the International Court of Justice (ICJ), whereby candidates are nominated by an independent body rather than by States parties, could enhance the quality of membership of the court.

Article 7 departs from the model provided by the Statute of the International Court of Justice in a number of respects. In New Zealand's view, the term of office should be reduced to 9 years instead of 12, to bring the tenure of office in line with that of judges to the ICJ (Article 13 of the Statute of the International Court of Justice).

Furthermore, New Zealand is not persuaded by the reasons given for the non-re-election principle. In both the Statute of the ICJ and the statute of the Yugoslav ad hoc tribunal, provision is made for the re-election of judges. We would favour reconsideration of this issue, with a view to providing for a shorter term coupled with the possibility of re-election.

Articles 19 and 20. Rules of the Tribunal and of the Court

A useful distinction has been made between the rules of the tribunal (article 19) and the internal rules of the court (article 20). In New Zealand's view, it is appropriate to have a general rule-making power and for the

procedural rules and rules of evidence to be published. Article 20 as it stands simply provides for the court to regulate its own internal procedure.

Article 21. Review of the Statute

New Zealand supports the five-year review provision contained in article 21. We would also favour the addition of a provision whereby a review conference shall be held every five years. The review option is important in relation to the jurisdictional provisions in part II of the statute. New Zealand can agree that this article may be more appropriately located in the final clauses of the statute.

Article 22. List of crimes defined by treaties

New Zealand supports article 22 in its current form. It is important for the credibility of the international criminal court that it have a strong consensual base from the outset. It follows therefore that the court's broadest jurisdictional responsibilities should relate to agreed international crimes in respect of which jurisdiction should be readily accepted by a large number of States. New Zealand supports the list of treaty-based international crimes compiled by the International Law Commission (ILC). Consideration should also be given to the addition of other especially serious and important international crimes, in particular aggression and war crimes which do not constitute "grave breaches" in terms of article 22 (b).

New Zealand agrees with the distinction between the treaties creating "international crimes" and other treaties where the crimes are more a matter of national than international law. New Zealand believes that this distinction should be maintained when consideration is given to adding new crimes to the list in article 22 in future.

New Zealand notes that some support has been expressed for including certain drug-related crimes, including the illicit trafficking of drugs across national frontiers, the laundering of drug money and the activities of narco-terrorists which threaten international peace and security, in article 22. While fully acknowledging the grave nature of these crimes, New Zealand considers that jurisdiction of the court over such crimes should be considered only under article 26 as a matter of special consent on the part of States.

New Zealand notes the difficulty involved in deciding whether torture (as contemplated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984) also qualifies for inclusion in the list of crimes under article 22. New Zealand agrees that a line must be drawn between the two strands of jurisdiction, but further consideration should be given to the placement of the crime of torture.

Article 23. Acceptance by States of jurisdiction over crimes listed in article 24

Ideally, the court would have compulsory jurisdiction with States bound simply by virtue of becoming a party to its statute. New Zealand recognizes,

however, that this would be unlikely in practice to achieve the widest possible support from the international community for the international criminal court.

On article 23, New Zealand considers that the flexibility offered by alternative A may detract from the effective operation of the court. Alternative B is preferred as a better mechanism for achieving a solid and certain jurisdictional base for the court for the article 22 crimes. If alternative B is adopted, New Zealand suggests that paragraph 4 of alternative A (whereby States not parties to the statute may accept jurisdiction over some or all of the categories of crimes in article 22) might also be included.

Article 24. Jurisdiction of the Court in relation to article 22

It is not clear whether paragraph 2 of article 24 applies in the case of a referral by the Security Council under article 25. In the absence of compelling reasons to the contrary, New Zealand believes paragraph 2 should apply to an article 25 referral. If it is right that the State concerned should consent to jurisdiction in the circumstances described in article 24 (2), it seems right that it should also consent where jurisdiction is invoked by a Security Council referral rather than a complainant State with jurisdiction to try the case itself (article 24 (1)). However, clearly this would not be the case of the Security Council, in referring a case, was acting pursuant to its powers under Chapter VII of the Charter of the United Nations.

Article 25. Cases referred to the Court by the Security Council

The question of the relationship between the international criminal court and the Security Council is of fundamental importance. In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations, New Zealand agrees that there is a case in principle for providing that the Security Council may refer cases to the court. A Security Council referral power may be all the more necessary if investigations are otherwise only to be commenced upon complaint by States.

It appears to be envisaged that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the court a situation of aggression, leaving it to the court's own prosecutor to investigate and indict named individuals. In New Zealand's view, it should be made clear that article 25, in setting out a right for the Security Council to refer cases to the court, is subject to and does not impinge in any way upon the scope of the powers granted to the Security Council under the Charter of the United Nations.

New Zealand doubts whether it will be possible to extend this power of referral to the General Assembly, given the different role and powers accorded to the General Assembly under the Charter of the United Nations.

Article 26. Special acceptance of jurisdiction by States in cases not covered by article 22

It is clear that the subject-matter jurisdiction of the court should be limited to crimes of an international character. Such crimes can be identified by reference to treaties in force. In addition, however, we recognize that the application of customary law in this respect also has to be considered.

New Zealand recognizes that, in principle, the court should be given jurisdiction in respect of crimes under customary international law. It is however also necessary in principle for acts constituting international crimes and subject to the jurisdiction of an international criminal court to be specified with as great a degree of clarity and precision as possible. New Zealand would support further elaboration of article 26 (2) (a) accordingly.

Article 29. Complaint

New Zealand considers that the prosecutor should be authorized to initiate an investigation in the absence of a complaint in the case of a crime apparently within the jurisdiction of the court but in respect of which the prosecutor has determined that there is no State which is willing and able to prosecute. New Zealand notes that broadly corresponding powers have been given to the Secretary-General of the United Nations under Article 99 of the Charter, whereby the Secretary-General may refer matters to the Security Council. It is also noted that means for preventing the abuse of the extension of the prosecutor's powers are contained in articles 32 (2) and 38.

Article 30. Investigation and preparation of the indictment

With regard to paragraph 1 of article 30, New Zealand doubts that the Bureau should have power to direct the prosecutor to commence an investigation where the prosecutor decides not to proceed. The exercise of such power is likely to be seen by an aggrieved suspect or State as an indication of predisposition or bias and to impinge upon the prosecutor's independent exercise of the functions of the position.

New Zealand supports the fact that article 30 (4) makes provision for guaranteeing the rights of a person during the investigation phase before the person has actually been charged with a crime.

Article 38. Disputes as to jurisdiction

New Zealand agrees with the approach taken in article 38 that, consistent with the court's existence as the collective authority of the States parties, any State party should be able to challenge the court's jurisdiction, not only those States that have a direct interest in the case.

Article 41. Principle of legality

New Zealand suggests that, rather than retaining the text contained in square brackets in subparagraph (a), what the statute needs to make clear here is whether the provision is concerned with treaties in force generally, or with

respect to the State exercising jurisdiction over the individual concerned. New Zealand assumes the intention is to cover the latter; this should be clarified.

Article 44. Rights of the accused

New Zealand suggests that article 44 (1) (b) should guarantee directly the right of the accused to conduct a defence and to have the assistance of counsel, and not simply guarantee that the accused is entitled to be informed of such matters.

On the substance of the rights in article 44 (1) (b), it would be preferable for "means" to be qualified as "sufficient means" so that there is no suggestion that an accused has to exhaust all his or her means before becoming entitled to legal assistance. It should also be made clear that such legal assistance is both "adequate" and "free".

New Zealand is opposed to trials in absentia, and disagrees with article 44 (1) (h) of the draft statute. The right to be present at one's trial is a fundamental principle which, as the ILC itself notes, is enshrined in article 14 of the International Covenant on Civil and Political Rights. New Zealand fully concurs with the views of the Secretary-General, as expressed in his report on the establishment of the Yugoslav war crimes tribunal (S/25704, para. 106): "It is axiomatic that the international Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights." It is noteworthy that Article 21 of that Statute does not permit trials in absentia.

Notwithstanding the difficulties involved in bringing the offender before the court in certain cases in the absence of international enforcement mechanisms, New Zealand is not convinced by the arguments put forward in favour of derogating from the principle that there should not be trials in absentia. It is one of the incidents of criminal proceedings wherever they occur that an accused person may attempt to defeat the course of justice. It does not follow that an exception should be made to the principle because the court is dealing with the most serious international crimes. It may equally be argued that the more serious the crime, the more important it is that fundamental rights and guarantees are maintained.

New Zealand does not consider that a conviction in absentia would constitute any sort of "moral judgement" or sanction. It is more likely that such judgements could be regarded as placing the international court above the law, and undermining the credibility of the court to act impartially and within established human rights norms. New Zealand also does not consider that the principle can be respected by circumscribing the situations in which exceptions may be entertained. In New Zealand's view, the principle must be adhered to, consistent with existing international human rights law.

Article 45. Double jeopardy

New Zealand is in principle opposed to any derogation from the principle of non bis in idem. We note that article 45 has been drafted carefully such that the court's role can be regarded as serving more in the nature of an appellate or review function vis-à-vis national courts. It is also noted that article 45 is modelled closely on article 10 of the Statute of the International Tribunal establishing the ad hoc tribunal on war crimes in the former Yugoslavia, and that the circumstances in which it applies are exceptional. Whether, however, paragraph 2 (a) of article 45 is appropriate in this context, given that the jurisdictional base of the court will be much broader than the Yugoslav tribunal, is a matter for further consideration.

Article 51. Judgement

With reference to article 51 (2), New Zealand supports provision for a dissenting judgement at first instance. It would be wrong in principle to prevent judges from expressing their views. It would also put the court on a different and inferior basis to both the ICJ and the Yugoslav tribunal in this respect. Dissenting or separate opinions would also be very important to the jurisprudence of the court and to both the defendants who chose to appeal convictions and appeals chambers when considering whether to overturn convictions.

Article 58. International cooperation and judicial assistance

Article 58 is based substantially on article 29 of the statute establishing the Yugoslav war crimes tribunal. New Zealand notes that a number of points will need to be addressed by States parties when enacting their requisite domestic legislation pursuant to this article. Consideration might therefore be given to other matters which are important to countries in terms of their domestic law. Such matters include whether it is envisaged that there could be grounds on which a request for assistance could be refused; who bears the cost when substantial assistance is given; and the exercise of compulsory powers within the limits available to domestic law-enforcement authorities.

Article 61. Communications and contents of documentation

Consideration should also be given to making provision in article 61 for requests to include the following elements:

- Details about the form in which documentary assistance (evidence) is to be supplied. It may need to be in a particular form to be admissible later in the court;

- A statement about the court's wishes concerning confidentiality and the reasons for confidentiality where it is required;

- The desired time-frame for compliance.

Article 63. Surrender of an accused person to the Tribunal

Further to article 63 (6), New Zealand considers that the power of delay should be extended to include persons who are mentally disordered (insane) or too ill to travel and face proceedings.

General comment

Several provisions in the draft statute touch on the interrelationship between national courts and national processes on the one hand and the international criminal court on the other in respect of the crimes at issue. Consideration should be given to making a suitable reference, perhaps in the preamble to the statute, to this relationship and to the respective roles and complementarity of the national and international processes.

ROMANIA

[Original: French]

[25 February 1994]

1. Calling the body a "Tribunal" is preferable to the initial name of "Court".

2. As for the link between the Tribunal and the United Nations, we favour the wording in article 2, paragraph 1, stating that "the Tribunal shall be a judicial organ of the United Nations".

3. We consider the best formulation to be that in article 4: "The Tribunal is a permanent institution open to States parties to the Statute of the Tribunal ... and to other States in accordance with this Statute. It shall sit when required to consider a case submitted to it."

4. We also favour the option of making the "Court", the "Registry" and the "Procuracy" (art. 5) the component parts of the Tribunal, as constituting an international judicial system.

5. We support the proposed inclusion in the "list of crimes defined by treaties" (art. 22) also the actions considered crimes as such by the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6. Of the three variants of article 23 on acceptance by States of the Court's jurisdiction, we opt for alternative A.

7. We consider it appropriate to broaden the category of subject-matters that may be brought before the Court under article 25, and to confer the authority to do so upon the General Assembly as well, thus avoiding impasses, particularly in cases where a member of the Security Council uses its right of veto.

8. With regard to the discussions concerning special acceptance by States of the Court's jurisdiction (art. 26, para. 2 (a)) over crimes not defined as such

in international treaties, such as aggression, or genocide in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide, we find the proposal to deal in article 25 also with this problem to be justified. In that case, the Security Council and the General Assembly (as proposed earlier) would have the authority to submit to the Court "a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals". Such a submission would naturally entail fulfilment of the condition laid down in article 27, requiring that it must first be determined that the State concerned has committed the act of aggression which is the subject of the charge.

9. Going back to article 7, we consider it somewhat excessive for judges to hold office for a term of 12 years. Setting a term of six years, with possible re-election for a single further term, seems more in keeping with the requirements, for the following reasons:

(a) A 12-year term is not to be found in the statutes of other international Courts, the maximum being terms of 9 years (in both the International Court of Justice at The Hague and the European Court of Human Rights);

(b) A six-year term, with a possible one-time renewal, would we believe be closer to the spirit of the draft Statute under consideration, which makes registrars (art. 12) and prosecutors (art. 13) eligible for re-election;

(c) If it is decided to establish a six-year term, the term of the registrar would have to be reduced from seven to five years (five years being also the term of the prosecutor).

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[23 February 1994]

Introduction

1. The United Kingdom Government has made clear its support for the project which is being undertaken by the International Law Commission to prepare a statute for international criminal court. While it is very conscious of the serious problems - jurisdictional, procedural, institutional, financial and others - which must be solved before an international criminal court is created, it is convinced that the attempt to resolve the difficulties is a worthwhile undertaking.

2. The draft statute which was before the Sixth Committee of the General Assembly last year, and which is the subject of the present comments, is an admirable beginning for this difficult task. Because of the expertise and working methods which the Commission has at its disposal, the Government regards

it as important that the Commission should ensure that it has addressed and fully dealt with all of the problems of a legal nature connected with the setting up of a criminal jurisdiction before any draft statute is dealt with in the more political arena of an intergovernmental conference. The Government considers in particular that rules of evidence are of such significance to the proper operation of the prosecution and of the court itself - an importance which goes beyond mere procedure - that the rules should be included in the draft statute and should initially be drafted by the Commission.

3. The United Kingdom Government considers that any international criminal tribunal which is established must be of the highest authority and the highest legal and moral quality. The Government regards it as necessary that States should enter into a solemn treaty commitment in relation to it, and that it should have the widest possible acceptance. The tribunal should be given a close institutional link with the United Nations, to give it a universal authority.

4. As a final point in these preliminary comments, the United Kingdom Government considers it important that the international community learn from the experience of the other international court which has recently been established: the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

Article 2. Relationship of the Tribunal to the United Nations

5. Leaving aside the question whether it would fall within the competence of the General Assembly or the Security Council to establish the tribunal as an organ subsidiary to them under Article 22 or 29 of the Charter, it is clearly inappropriate that the court should be subordinate to either of those two bodies. Further, the statute will impose obligations upon States and it will be necessary for this to be done in some legally valid way. Since the new tribunal will not, unlike the Tribunal for former Yugoslavia, come within the responsibilities of the Security Council for the maintenance of international peace and security, it will not be possible to impose the necessary obligations upon States by means of a Security Council resolution, as in the case of the Tribunal for the former Yugoslavia. It will therefore be necessary to establish these obligations by treaty. It is suggested that the statute be adopted by international treaty, and it may be useful for the Commission to draft the necessary treaty provisions. The treaty could be negotiated and adopted under the aegis of the United Nations. It is also suggested that an institutional link of some kind with the United Nations be created, not amounting to the establishment of an organ subordinate to one of the principal organs.

Article 4. Status of the tribunal

6. The Government welcomes the provision that the tribunal should sit only when required to consider a case submitted to it.

7. The provision in paragraph 2 of article 4 will need more thought, in relation to status, legal capacity and the persons authorized to negotiate on

behalf of the tribunal, once a decision has been taken as to the relationship between the tribunal and the United Nations.

Article 5. Organs of the tribunal

8. Whatever the Prosecutor's Office is called in other languages, "Procuracy" is inappropriate in English.

Article 6. Qualifications of judges

9. The court is a criminal tribunal. In the Government's view, it is inappropriate that judges should be appointed who have had no judicial experience in criminal cases. In addition to the qualifications set out in the first sentence of the draft article, the United Kingdom suggests it should be made a condition of appointment that a judge should have had judicial experience in criminal trials.

Articles 7 and 8. Election of judges and judicial vacancies

10. Consideration should be given to making express provision for what is already implicit in article 8 that vacancies may arise because of the death or resignation of a judge.

Article 11. Disqualification of judges

11. Paragraph 3 provides that the accused may request the disqualification of a judge. It will be necessary to make provision for grounds to be put forward by him to justify disqualification for one of the reasons set out in paragraph 1.

Article 13. Composition, functions and powers of the Procuracy

12. In the Government's view, careful consideration should be given to the qualifications required of the prosecutor and the deputy prosecutor, particularly in relation to the following points:

(a) If the prosecutor is to be disqualified from acting in relation to a complaint involving a person of the same nationality, there should be a requirement that the deputy is of a different nationality;

(b) The requirement that the prosecutor and the deputy have the highest level of competence and experience in the conduct of both investigations and prosecutions would give difficulty to many common-law countries where those functions are in separate hands. The qualifications should be in the alternative. It should be a requirement that either the prosecutor or the deputy be a lawyer of several years' seniority.

13. The Commission might consider whether paragraph 3 is sufficiently clearly worded.

14. As regards paragraph (4) of the Commentary, the Government is of the view that consultation of the Bureau on the prosecutor's staff appointments would not

compromise the prosecutor's independence, and such a provision might appropriately be included.

Article 19. Rules of the tribunal

15. Rules of evidence include matters of considerable importance which affect the rights of the accused. It is noted that one or two basic provisions of the rules of evidence are included in article 48 and elsewhere in the statute. The Government considers however that the Commission should give further consideration to this important subject and should provide draft provisions for the rules as a whole, to be included in the draft statute.

Article 21. Review of the statute

16. The Government shares the view that this article is better placed in the final clauses of a treaty adopting the statute. The Government doubts whether it is appropriate to refer to the Code of Crimes in the way in which the draft article does. While a generally accepted Code will of course have relevance to any international criminal jurisdiction which is created, it is difficult to frame a satisfactory reference to an instrument which has not yet been adopted, and it may be preferable not to refer to it at all.

Article 22. Lists of crimes defined by treaties

17. As the Working Group notes, part II of the draft statute is the central core of the draft. Articles 22 to 26 lay down two strands of jurisdiction, based on a distinction drawn between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. As regards article 22, the United Kingdom Government understands and shares the reservations expressed by some Governments in the Sixth Committee with regard to conferring jurisdiction upon an international court over crimes which were defined with insufficient precision in the relevant treaties, in respect of which the treaties were drawn up without any idea of bringing the crimes before an international criminal court, and for which the treaties did not specify any penalties. Nevertheless, the United Kingdom Government considers that, if an international court is to be established under present conditions, a list of crimes along the lines of those set out in article 22 should form the major part of its jurisdiction. The Government does however consider that the list of crimes in article 22 should be examined again to ensure that only those treaties which have received a very substantial acceptance by the international community should be included; the criterion of entry into force is not, in the United Kingdom's view, sufficient to qualify a treaty for inclusion in the list. Subject to this proviso, however, the Government would not oppose the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 23. Acceptance by States of jurisdiction over crimes listed in article 22

18. The United Kingdom Government shares the view expressed in paragraph (2) of the commentary that the approach set out in alternative A (the "opting-in" approach) best reflects the consensual basis of the court's jurisdiction. Conferring jurisdiction on an international court represents a certain ceding of jurisdiction by individual States; this ceding is best established by the two-stage process of acceptance of the statute and the separate acceptance of the jurisdiction of the court over specific crimes in accordance with alternative A.

Article 24. Jurisdiction of the court in relation to article 22

19. In the Government's view, the Commission should also give consideration to requiring the acceptance of its jurisdiction by the State in whose territory the offender is located. That consent will not always be required under the existing provisions of paragraph 1 (a).

20. The Commission is requested to consider whether the drafting of paragraph 1 (a) and (b) is adequate. It is unclear whether all States parties having jurisdiction under a treaty to try the suspect before their own courts are required to accept the court's jurisdiction, or whether the consent of any one of the States parties to the relevant treaty is sufficient. The Government assumes that the latter is intended but does not regard this as acceptable, at least with regard to paragraph 1 (a). The Commission is asked to consider whether, in relation to paragraph 1 (a), the consent of all such States should be required.

Article 25. Cases referred to the court by the Security Council

21. It is not clear from this article whether the Security Council may refer cases to the court where the consents required under article 24 or 26 have not been obtained, or whether it is intended that the court will only have jurisdiction in respect of a complaint referred to it by the Security Council if the relevant States have accepted the Court's jurisdiction. If the substance of the article is to remain, the Government would prefer the latter view to prevail.

22. The Government is not, however, convinced that the understanding of the Working Group expressed in the second sentence of paragraph (2) of the Commentary is adequately reflected in the provision. The Commission is asked to consider changes to articles 25 and 29 to ensure that the Security Council does not have the powers to refer complaints against named individuals, but only to request the prosecutor to investigate particular situations.

23. The Commission is asked to consider the inclusion of a provision in this part of the statute requiring that where the Security Council is seized of a dispute or a situation, a case falling within that dispute or situation may not be referred to the tribunal except with the leave of the Council.

Article 26. Special acceptance of jurisdiction by States in cases not covered by article 22

24. The United Kingdom has grave doubts about the desirability of all the provisions of this article. As regards paragraph 2 (a), it is not satisfactory that a criminal court has jurisdiction over unspecified offences in respect of which there cannot but be uncertainty and controversy. It is not satisfactory to argue that it will be for the court itself to determine whether there is the necessary international consensus for the existence of a particular crime: an accused is entitled, even during the prosecution process, to more certainty about what he is accused of than this article provides; even if the court eventually decides that the crime is not one "accepted and recognized by the international community of States as a whole", he will have been subject to the prosecution process even though not convicted.

25. The Commission is invited to consider whether there are indeed any crimes under general international law of the kind referred to in this subparagraph, and if so, to identify them expressly in the article.

26. As regards paragraph 2 (b), the United Kingdom is not in favour of including in the statute crimes under national law which have not been defined with precision in an international treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Furthermore, the attempt to restrict jurisdiction to "exceptionally serious crimes" is unlikely to be workable: no definition of "exceptionally serious" is attempted and it is unlikely to be possible to produce one that would be generally agreed.

Article 28. Applicable law

27. The Commission is requested to look again at the description of national law as a "subsidiary source". Even if, as the United Kingdom would wish, a decision is taken to delete article 26 (2) (b), national law will often have to be resorted to by the court. The components of an offence (with the exception of genocide), the applicable defences and the relevant penalties (subject to the provisions of the statute) will all be matters for national law. This being so, it is important that the court be directed to the appropriate national law: the Government presumes that it will be the law of the State (or the jurisdiction within that State) where the crime was committed.

Article 29. Complaint

28. The Commission is requested to consider whether it would not be advisable to elaborate upon what supporting documentation is required as a minimum to accompany a complaint.

Article 30. Investigation and preparation of the indictment

29. The provision does not specify what constitutes a "sufficient basis" for the prosecutor to proceed with the prosecution of a case. Paragraph (5) of the commentary, and the provisions of article 32, make it clear that the test is the existence of a *prima facie* case. The government doubts whether the

establishment of a prima facie case is a sufficient basis for instituting a prosecution. The Commission is invited to consider the practice of States with regard to the institution of prosecutions in national courts: the Government doubts whether the standard for a prosecution in an international court should be lower than that required for a national court. In the United Kingdom, for example, a prosecution is not instituted unless it is considered that there is at least a realistic prospect of conviction.

30. Paragraph 1 provides that the Bureau may direct the prosecutor to commence a prosecution. The Commission is requested to consider whether a defendant prosecuted at the behest of the court contrary to the inclination of the prosecutor following a thorough investigation would believe that he was receiving an impartial and fair hearing.

31. Paragraph 4 (a) provides for a person under investigation to be informed that his silence in response to questions will not be a consideration in the determination of his guilt or innocence. The Government fully shares the view that there ought to be no question of a person being convicted on the basis of silence alone, without other evidence. The Government does not, however, regard it as an indispensable element of a fair trial that no consideration at all should be given to whether or not an accused person has remained silent. Within this country, the Criminal Law Revision Committee recommended in 1972 that it should be possible in certain carefully defined circumstances for inferences to be drawn, in support of other evidence, from the refusal of a defendant to answer relevant questions; the United Kingdom Parliament is currently considering legislation based on its proposals.

32. The Commission is requested to reconsider the wording of paragraphs 2 and 3, which may be read as suggesting that the prosecutor may summon suspects, victims and witnesses, collect evidence and conduct on-site investigations directly on the territory of States parties and others, without seeking the cooperation of the State concerned. Such powers are in the United Kingdom Government's view only necessary and appropriate in situations where a State fails in its cooperation obligations or where its criminal justice system has broken down. Previous recommendations by the Commission clearly envisaged that evidence should be collected through cooperation mechanisms based on international mutual legal assistance arrangements (but with fewer grounds for refusal and, of course, no mutuality). The draft statute might be augmented so as to place legal assistance obligations on States parties whose cooperation is requested by the prosecutor or the court, and to differentiate between different degrees of acceptance, rather as article 63 does for surrender of suspects.

33. It is therefore suggested that articles 30 (2) and 30 (e) be modified so as to provide that the prosecutor shall have power to request: (a) the presence of suspects, victims and witnesses for questioning; (b) the disclosure and production of evidence, including any document or exhibits relating to the complaint; and (c) on-site investigations.

Article 31. Commencement of prosecution

34. The relationship between articles 31 and 62 (a) on the one hand, and article 33 on the other, may need further thought. Article 31 indicates that a

person may be arrested or detained under the statute while the indictment is still in preparation, on the basis of the issuance of a warrant or other order of arrest or detention by the court (a provisional arrest warrant) and article 62 (a) provides that in cases of urgency the court may request provisional arrest. Article 33 implies, however, that States parties' obligations to arrest and detain the subjects of such warrants arise only after the indictment has been personally notified to the accused. There are no provisions designed to secure cooperation in pre-indictment arrest or detention. The Commission may wish to cover this. If they do, however, for human rights reasons it would not be right to allow too long a period to elapse between execution of the provisional arrest warrant and the notification of the indictment to the accused: the European Convention on Extradition, for example, imposes a 40-day limit.

Article 32. The indictment

35. The Government is of the view that it is not sufficient to leave to rules of court matters such as details of the requirements for the "necessary supporting documentation" which must be considered by the Bureau before the indictment is affirmed. It is presumed that the phase is intended to refer either to the evidence, in written form itself, or a summary. The provision should specify the extent of evidence required and the manner in which it is to be placed before the Chamber. It is presumed that the indictment itself will not contain a summary of the evidence.

Article 37. Establishment of Chambers

36. The Government considers that five is a good number for the judicial strength of a trial Chamber. The Government is of the view that the constitution of chambers should be dealt with by the Bureau in whatever manner it thinks fit. This is preferable to leaving the matter to be regulated by inflexible rules.

Article 38. Disputes as to jurisdiction

37. The Government considers that the view expressed in paragraph (5) of the commentary, that it would be imperative for the accused to be allowed to challenge the jurisdiction of the court before trial, should be acted upon and that the merely institutional obstacles thought to exist should not stand in the way of a solution being found. The Chamber to deal with the case should rule on the question, or if the challenge is made before the indictment is confirmed (possibly after the person's arrest), a Chamber should be made available for the purpose.

Article 44. Rights of the accused

38. The Commission is invited to look again at the possibility of distinguishing different situations for the purpose of determining whether a trial should be held in the absence of the accused; the Government is of the view that the question should not be left to decision by the court, as provided in paragraph 1 (h). In the Government's view a trial should not be held in the absence of the accused unless (a) he has been duly notified and chooses to

appear not in person but by means of a legal representative, and (b) where the accused has been arrested but escapes after the trial has begun but before it has been completed.

39. Paragraph 3 deals with the information which is to be made available to the defence. This is another case in which the Commission is invited to consider the inclusion in the Statute of further details governing the role of the prosecutor and the court. In particular, the explanations given in paragraph (8) of the commentary might usefully be included.

Article 45. Double jeopardy

40. The Commission is requested to look again at paragraph 2 (a) which has a reference to an "ordinary crime". The concept is a very difficult one to define and it may be that the best course is simply to delete this subparagraph.

Article 47. Powers of the court

41. Paragraph 1 refers to the court having the power to require the attendance and testimony of witnesses, and to require the production of documentary and other evidentiary materials. In view of the comments on article 30 above, to the effect that in practice the most acceptable and indeed most efficient way of obtaining both persons and evidence is by requesting cooperation from the States parties which will have certain obligations to assist, it is suggested that it would be preferable to refer to the court's power to issue orders for the attendance and testimony of witnesses, and for the production of documents, etc. The word "orders" is in fact used in the commentary. The same point arises on article 48 (1).

Article 48. Evidence

42. The Government draws attention to its comments on article 19 above, relating to the desirability of the statute providing further rules of evidence. One matter that should be addressed is whether a witness is to have a privilege against self-incrimination before the tribunal. The question arises whether a witness is, in particular, obliged to answer questions which may place him in breach of his national law.

43. As regards the point made in paragraph (4) of the commentary, it is considered that in view of the evidentiary difficulties for national courts in prosecuting perjury before the tribunal, it would be preferable to address in the statute the question of giving false testimony before the court.

Article 53. Applicable penalties

44. Paragraph 2 departs from the previous recommendations made by the Commission to the effect that penalties should be based on the applicable national law, subject to residual provision for the court to lay down penalties where none is specified or where the penalty specified falls outside international norms. The Government considers that the previous recommendations should be reverted to. The penalties imposed by the State in whose territory the crime was committed should be the first point of reference and should be

followed, subject to the reservations made above. Such an approach would accord with the generally accepted principle that a person committing a crime should know what punishment he might expect.

45. As regards paragraph 4, the Commission is invited to consider whether the court should be directed to the order in which fines or confiscated property should be paid out. As regards subparagraph (c), it is questionable whether the provisions referred to in paragraph (4) of the commentary are likely to be used in practice. It is doubtful whether a trust fund is needed at all, and it may be that the tribunal should itself have the power to pay sums of money directly to the victims or to the State of their nationality expressly for their benefit.

Articles 55 to 57. Appeal

46. The Government is in favour of providing a right of appeal for the accused. It is of the view, however, that seven is too small a number for the Appeals Chamber, having regard to the fact that the judges in the Appeals Chamber will be of the same rank as the trial judges. It is suggested that an Appeals Chamber of at least nine judges would be more appropriate.

47. As regards the possibility of the prosecuting being given a right of appeal, it is considered that any such right should be limited to specified grounds of appeal, namely on a point of law or on the sentence given by the trial court. The prosecutor should not have a general right of appeal.

Article 58. International cooperation and judicial assistance

48. The Commission is requested to consider what "interim measures" might be required.

Article 62. Provisional measures

49. Attention is drawn to earlier comments on provisional arrest. In relation to any provisional measures the request from the court would need to be a formal request if it is to be acted upon by States. States will be able to respond only in so far as their national laws permit which may not, for instance, include preventing the escape of a suspect unless a provisional arrest or arrest warrant has been issued. National laws may also impose special conditions for search and seizure of evidence; this is recognized in most international mutual legal assistance agreements.

Article 63. Surrender of an accused person to the tribunal

50. The Government notes that, under article 63 (3) (a), a State party which has accepted the jurisdiction of the court with respect to the crime in question is obliged to take immediate steps to arrest and surrender the accused person to the court. Having regard to the provisions of article 9 (4) of the International Covenant on Civil and Political Rights, the Government's view is that the accused person must have a right to challenge arrest and detention in the requested State, though the grounds on which challenge is possible should be kept to a minimum. The view is taken, therefore, that a State which had taken immediate steps to arrest the suspect would have fulfilled its obligations even

if the suspect successfully exercised his right to challenge his arrest and detention.

51. Article 63 (3) (b) refers to a State party which is also a party to the treaty establishing the crime in question but which has not accepted the court's jurisdiction over that crime. The Government queries the obligation to arrest. Arrest may be premature if the national authorities are not ready to lay a charge immediately or find, on reviewing the case, that a charge would not be likely to succeed.

52. Article 63 (5) requires States parties, as far as possible, to give priority to court requests over requests for extradition from other countries. This departs from the Commission's previous recommendation that States parties should be free to choose in the case of multiple requests, but could be offered non-binding guidelines on choosing, for example suggesting that requests from the court are given special consideration. The article 63 (5) requirement, moreover, relates to any request under paragraph 2: the requested State might not even have accepted the court's jurisdiction over that crime or that category of crimes. The Commission is invited to consider deleting article 63 (5). Non-binding guidelines, as originally proposed, could however be helpful.

53. Article 63 (6) is, in the Government's view, helpful, as is the recognition of the speciality rule in article 64.

54. Attention was drawn earlier in these comments to the desirability of an additional article on legal assistance, which would inter alia spell out the obligations of States parties to comply with requests. It is for consideration whether obligations, or the same degree of obligation, should be imposed on States parties that have not accepted the court's jurisdiction in relation to the crime, or the category of crime, in question. It would also seem desirable for the statute to indicate, even if the list is non-exclusive, the types of legal assistance that may be sought from States parties - as, for instance, in the United Nations Model Treaty on Mutual Assistance, article 1 (2).

Articles 66 and 67. Enforcement of sentences, pardon, parole and commutation of sentences

55. The Commission is asked to consider whether the statute should cover the procedures to be followed if a prisoner convicted and sentenced by the tribunal escapes from custody.